

The Administrative Law Judge awarded benefits based upon functional impairment and denied respondent's request to impose liability on the Kansas Workers Compensation Fund. On appeal, claimant argues the Award should be based upon work disability and should be increased. Respondent contends that the Kansas Workers Compensation Fund should be liable for a portion of the Award. These are the only issues to be considered on

appeal and the Appeals Board adopts the findings by the Administrative Law Judge on all other issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties the Appeals Board finds:

(1) Claimant should be awarded benefits based upon work disability and, more specifically, should be awarded benefits for a thirty-eight percent (38%) permanent partial general disability.

Claimant began experiencing pain in her right wrist while working as a cake decorator in late January and early February of 1992. She went initially to her family physician, Dr. Patton. Dr. Patton referred her to Dr. Eyster. Dr. Eyster prescribed a splint and then a cast which claimant wore as she continued to work for approximately five (5) weeks. Her duties were modified, but she continued to work with her left hand in the baking section, packaging and cleaning. Dr. Eyster took her off work in March of 1992. She transferred to the care of Dr. Melhorn and she remained off work until June of 1992 when Dr. Melhorn released her to return. When she returned, respondent changed her job duties again so that she was then running a cash register and serving customers. This last job that she performed required that she bag and staple products, operate the cash register and clean the chicken roaster.

Dr. Eyster diagnosed one condition on the right forearm and another on the left. On the right he diagnosed Madelung's deformity, aggravated by work. For the left forearm he diagnosed tendinitis. He rated her functional impairment at three percent (3%) on the left and eight percent (8%) to the right hand, both he considered to result from overuse. He combined and converted these to six and one-half percent (6.5%) of the whole body. He recommended that she not do repetitive activities involving repetitions of over fifteen (15) times per hour.

Claimant testified that her job duties at Food Barn, including the last job she was assigned, required repetitive activities which violated the restrictions recommended by Dr. Eyster. She also testified that the continued work activities caused additional pain and discomfort. Although it appears from the record that Dr. Melhorn may have suggested she try returning to her work for respondent, there is nothing in the record which convincingly contradicts the evidence she could not return to that work. The respondent is, therefore, not entitled to the presumption that there is no work disability, found in K.S.A. 1991 Supp. 44-510e.

Claimant has, in addition, introduced the testimony of Jim Molski. Mr. Molski testified that based upon Dr. Eyster's restrictions, claimant lost between sixty-five to seventy percent (65-70%) of her ability to perform work in the open labor market. The Appeals Board notes that at the time of his deposition he mislabeled this opinion as one relating to wage loss. However, the report clearly expresses this opinion as one relating to loss of ability to perform work in the open labor market. The Appeals Board finds this sixty-five to seventy percent (65-70%) reduction was intended to relate to loss of ability to perform work on the open labor market. Mr. Molski separately expressed his opinion that claimant has lost between five and thirteen percent (5-13%) of her ability to earn a comparable wage. Mr. Molski's testimony provided uncontradicted evidence which is

neither unreasonable nor improbable. The Appeals Board, therefore, finds the injury reduced claimant's ability to earn a comparable wage by nine percent (9%) and ability to perform work in the open labor market by sixty-seven and one-half percent (67.5%). See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The Appeals Board also finds it appropriate to give equal weight to the two prongs of the test for determining work disability. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). On that basis the Appeals Board finds claimant has a thirty-eight percent (38%) permanent partial impairment and awards benefits on that basis.

(2) The Appeals Board agrees with and affirms the finding that the Workers Compensation Fund is not liable for any portion of the Award. The evidence does not establish knowing retention of a handicapped employee. The evidence also does not establish either that the injury would not have occurred but for pre-existing impairment or, in the alternative, the extent to which pre-existing impairment contributed to the resulting disability. Respondent's claim against the Fund is, therefore, denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated June 6, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kari Hein, and against the respondent, Food Barn, and its insurance carrier, Credit General Insurance, for an accidental injury which occurred February 1, 1992 and based upon an average weekly wage of \$195.00, for 13.86 weeks of temporary total disability compensation at the rate of \$130.01 per week or \$1,801.94, followed by 401.14 weeks of permanent partial disability benefits at the rate of \$49.40 or \$19,816.32 for a 38% permanent partial general body disability, making a total award of \$21,618.26.

As of June 16, 1995, there is due and owing claimant 13.86 weeks of temporary total disability compensation at the rate of \$130.01 per week or \$1,801.94, followed by 161.85 weeks of permanent partial disability compensation at the rate of \$49.40 per week in the sum of \$7,995.39, for a total of \$9,797.33 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$11,820.93 is to be paid for 239.29 weeks at the rate of \$49.40 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James T. McIntyre, Wichita, KS
Gregory D. Worth, Lenexa, KS
Kendall Cunningham, Wichita, KS
John D. Clark, Administrative Law Judge
George Gomez, Director